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213; *Benjamin v. Hillard*, 23 How. 149; *Lyon v. Bertram*, 20 How. 150. Numerous similar cases are found in the Circuit Courts. It is, however, by no means peculiar to the national jurisprudence, for in its earlier history, there being some decisions tending the other way, they adopted the rule we have announced, because it was supported by so many State adjudications. Every American treatise announces the rule which is applied in the following judgments. They decide and illustrate the principle that waiver is a question of fact depending upon the circumstances of each case, and that the law will not presume a waiver where it is not clear that the parties intend one. *Kellogg v. Denslow*, 14 Conn. 411; *Reed v. Randall*, 29 N. Y. 358; *Miller v. Eno*, 14 N. Y. 598; *Borrekins v. Beavan*, 3 Rawle 23; *Osgood v. Lewis*, 4 Har. & Gill 496; *Hastings v. Lovering*, 2 Pick. 214; *Field v. Kinnear*, 4 Kansas 476; *Babcock v. Price* 18 Ill. 420; *Cooley v. Brigham*, 1 Metc. 552; *Fielder v. Starkey*, 1 H. Bl. 17; *Buchanan v. Pamshaw*, 2 Term 745; *Hayworth v. Hutchin son*, Law Rep 2. Q. B. 447; 1 Parsons' Contr. 591, (5th ed.) Benj. on Sales, 463, 522, 673, et seq.; Sedg. on Dam. 319, (4th ed.)

Within the rule of these cases, the acceptance and use of these bonds must either have been sold or the work must have stopped. It is an irresistible inference from the proof that every city official knew the rate at which they were being disposed of—one utterly ruinous to the contractor if he was to have no remedy for the city's default. So far from the circumstances under which the parties acted indicating an intention on the one part, or expectation on the other, of waiver, the presumption is much stronger of an understanding that they would be sold at a discount and the loss made good.

Supreme Court of Missouri.

ELIZABETH GARVIN *et al.* v. JOHN P. WILLIAMS, *et al.*¹

Any transactions between a guardian and a ward recently arrived at age, by which the guardian obtains an advantage or bounty, will be deemed *prima facie* fraudulent, on account of the recent confidential relations of the parties, and the burden of proof will be upon the beneficiary to show that the gift or arrangement was fair and conscientious.

Evidence in this case held not sufficient to support a verdict in favor of the guardian.

In an issue to try the validity of a will, the beneficiaries under the will being parties to the action, are competent witnesses in favor of the will. They are not within the exception in the statute which excludes the other parties where one of the original parties to the contract or cause of action is dead.

¹We give an exceptional amount of space to this case, as it was very elaborately argued and considered, and we are not aware of any case in the books in which the whole evidence is reported and held insufficient to support the will.
ED. A. L. R.

This was a proceeding by appellants, the heirs at law, of William David Petticrew, contesting the validity of his last will and testament, whereby he devised an estate of the value of seventy or eighty thousand dollars, to John P. Williams and others. The trial resulted in a verdict for the will, and the contestants having thereupon moved for a new trial, and the same having been overruled, they appealed on the three following grounds, among others set forth in their motion.

1st.—Error in excluding the following italicised words from the deposition of Eliza Garvin, of Virginia, a witness for plaintiffs—“My husband, Gilliland Garvin, and myself, lived with his mother, Mrs. Elizabeth Garvin, from 1848 to 1852, when we returned to Virginia. Never saw William David but once, and that was when I went with my husband to Mr. Williams’ to see him. Never heard any of the family speak unkindly of him. *Have seen the old lady cry because she could not have the child with her sometimes*”—and in excluding the following italicised words from the deposition of William Steele, another witness of plaintiffs—“I visited the West and stopped at Brunswick in 1848. While there I sought an introduction, and was introduced to Mr. Williams by an acquaintance of mine. I inquired after my cousin, William D. Petticrew, and Williams invited me to his house, as *I thought, in a cool, distant and formal manner*, and I did not go.”

2d.—There was no evidence tending to support the verdict.

3rd.—Error in granting the instructions asked for by defendants.

The pleadings and evidence showed the following state of facts. The testator was born in Keytesville, Chariton county, Missouri, September 12th, 1839. In 1845 he lost his mother, and in February, 1847, also, his father, Doctor Petticrew, who devised him the property in question, and appointed John P. Williams executor and guardian. Williams and the Doctor had long been partners with Harrison in the milling business, and it was in proof, that when the Doctor made his will Williams had been sent for and was present, and that the doctor, when asked by Williams what he was to do with the boy and how he wished him educated, said he desired Williams to raise him as he would his own child. At the time the doctor had living with him, as his housekeeper, his sister, Mrs. Garvin, whom, with her two children, Gilliland and Bettie, he had brought out from Virginia, shortly after the death of his wife. The other relations lived in Virginia or Tennessee, and it was in proof that none had ever visited him, and that one, of his cousins, named Steele, was at Brunswick in 1848 or 1849, within six or eight miles of Williams’ residence, for several weeks; that he was twice invited, once by Mr. Williams and then by Mr. Williams’ brother-in-law to come out and see his cousin, and did not do so. It was also in evidence, that the doctor had by his will given to his sister, Mrs. Garvin, a life-estate in a tract of land, \$50 to build her a house to live in, and a like estate in a negro woman and her two infant children.

The evidence further showed that the boy continued to live with his aunt some two or three months after the doctor's death, when Williams took him to his home, where he remained until September, 1857, at which date he sent him with his son Thomas to the college at Fayette. That he attended there two sessions and more, and was in the habit of going home and spending the holidays and vacations. After quitting Fayette in the fall or early winter of 1859, he attended commercial school in St. Louis, and went thence to New Orleans on account of his health. At this latter place he remained till toward summer of 1860, when he returned to his home in Chariton. In February, 1859, he had the measles, which left him in a feeble state of health and with a cough. After continuing at home during the summer and fall of 1860, his guardian took him South about the first of December, and he expired the same month, of consumption.

It was also in proof that he and his guardian had a settlement on the 13th of September, 1860; that they appeared in the Probate Court on that day, and the settlement was approved and entry of satisfaction and release of the guardian and his securities by the ward duly made. On this occasion, when Crawley turned and asked Petticrew if the amount of the mill account was correct, he said it was right, and he was satisfied and had confidence in his "Uncle John" that he would not do him injustice. And on the next day, the 14th, he made the will in question, Harrison and Crawley being the witnesses.

Harrison testified that Williams, Doctor Petticrew and himself had been partners in the milling business, and that after the doctor's death, Williams and himself continued and were still in the business. That at the request of Williams who wrote down for him, he came up from Glasgow, and Williams, young Petticrew and himself made a settlement of the old mill accounts, embracing a period of four or five years, from 1843 to 1848, and amounting to some \$40,000. This settlement they made at Williams' house, and they had the mill-books there. They commenced about the 10th of September, and when through, they all went to Keytesville, Petticrew riding with Harrison in his buggy. On reaching Ketesville, they went to Crawley and Elliott, who had been several days engaged in making out for Williams and Petticrew a settlement of those matters in the Probate Court pertaining to the individual estate of Doctor Petticrew. Here the balances of the two settlements were added by Crawley, and the notes and accounts and other property of the estate was turned over to Petticrew, Williams giving, in addition, his note to Petticrew for a money balance of \$12,500, and taking his receipt for the same. As soon as this was done, they went, as before stated, and finished the business in court. After the settlement they returned to Williams' house, and says Harrison, "I stayed in the room with Petticrew that night. In the course of conversation he observed he wanted to make a will, and as he didn't want the thing known he was bothered about getting witnesses. I told

him I thought I could fix it for him if he didn't want it known—that I could be one and perhaps Mr. Crawley could be the other. Previous to this though, when going to Keytesville in the buggy, he had observed to me that Mr. Williams' family appeared more like relations to him than anybody else, and didn't wish any of his blood kin to have any portion of his property whatever, and stated his reasons for it. He said he had written several letters to his relations in Virginia, and had sent them daguerreotypes and they never had written to him, or even so much as acknowledged the receipt of them. And that while he was lying sick, one of his cousins came out to Brunswick and was there several weeks, and he sent him word to come and see him and he had not done so. And that he did not intend any of his relations should have any of his estate, not even a dollar. So next morning after the night I had stayed with him, he requested me to tell Mr. Crawley to ride out and write his will. Accordingly I started with Mr. Williams to the upper-mill where we had business to settle with our partner White, and he turned off to the lower-mill to get the upper-mill book, and I went on through Keytesville and told Crawley and proceeded on to the upper-mill. Williams got there about two o'clock in the evening, and we transacted the business with White and then returned to Mr. Williams', reaching there a little before night, or about dark. I went around the house, I think, to tell the boys to take the horses, and I didn't see and don't know where Mr. Williams went. I then went in the house, and in a few minutes went up stairs on Crawley's coming down for me. When I got up there, Petticrew asked me whether it was necessary I should know the contents of the will. I told him no—that all that was necessary for me to know was that he signed it for a purpose. I asked him no questions and I knew nothing of its contents. After the will was signed, and subscribed by Crawley and myself, he took it and put it away in his trunk. In the following November I went up from Glasgow, carrying some New York exchange which Mr. Williams had written for me to bring him for the purpose of using it on the trip which he and Petticrew were about taking South, and the night before they started I stayed in the room with Petticrew, and he handed me his will sealed up in a large envelope, with instructions to take care of it, and I took it and deposited it in the bank at Glasgow, where it remained until after Petticrew's death and burial. I never knew of the contents of the will till after the seal closing the envelope containing it was broken by the clerk of the Probate Court, when taken there for probate. I have no knowledge that Mr. Williams knew a lawyer was at his house the day the will was made. Nothing passed between him and me on the subject. I don't know that he knew that Crawley was there that day. I don't think he learned it from me. I never mentioned the fact that Petticrew had made his will to any one, until after his death."

Crawley testified that on the 14th, about noon, Harrison came into Keytesville and told him what Petticrew wanted—that he

accordingly rode out about two o'clock, the distance being about two and a half miles, and on going into the parlor he saw Petticrew lying on the sofa, and there were present Mrs. Williams and some one or two of Mr. Williams' daughters, and some lady visitors of the neighborhood. That after remaining a while in general conversation, Petticrew remarked that "the papers he wished me to see were up in his room, and upon his inviting me, we went up together. On going into his room, he got pen, ink and paper, and put them on the table which I drew in front of the bed, and I took a seat at the table and he reclined on the bed. Instead of a pen I used a pencil, and as Petticrew dictated I took notes. He set his own values on the slaves, and named the persons to whom he wished them to go, and also the amount to go with them in order to make the bequest or gift of the amount desired. When he came to Mr. Williams, he said, "I will give him \$10,000," and when I had gotten it down, he said, "No! scratch that out—I won't give him anything." Then after a pause, with his head down, as if reflecting, he remarked that his "Uncle John" had a second wife, and some of his children by her might get it, and then he said, "I will give him \$5,000 any way." After getting through the memorandum, I then proceeded to write out the will in form, and during this he spoke of his kin, and said they didn't seem to care anything about him, and he didn't mean to let any of them have a cent of his property. He also spoke of the first Mrs. Williams as having been a mother to him, and her children as brothers and sisters, and of his having affection for them as such. Of his own relations he knew none except his aunt, (Mrs. Garvin) and family; that none had seemed to take any particular interest in him, and he had no affection for them, and he saw no reason why he should have. He further said the conduct of his aunt's family had been such as to disgrace him and his name, and that of his father, and he didn't desire they should have any part of his estate. He assigned as reasons for his bequests to Robert P. Williams, of Fayette, and John Lewis, that they were favorites, and he wanted to leave them something. He suggested giving \$5,000 to Bob Prewitt, to keep his kin from breaking his will, and on my telling him the legatees would have interest enough in the matter to see to that, he concluded not to put it in. When through with the writing, he mentioned Harrison, and asked whether it was necessary to let him know the contents of the will, and on my telling him that it was not necessary, I then went down stairs and brought Harrison up. The will had been read over before this, either by Petticrew himself, or by me to him, and after Harrison came up we all signed it. I then put it in an envelope, and handed it to Petticrew, and he laid it away in his trunk. When the writing of the will was finished, or while it was going on, Petticrew made me promise not to reveal or disclose its contents to any one, and after Harrison came up to witness it, Petticrew requested us not to mention the matter to any one. I have no knowledge that he ever made any will besides this. This will

was not read to Harrison, nor did he read it. I never told any one of the will, or that Petticrew had made a will, until after his death and burial. He said nothing about his having said anything to any person about making a will. He dictated and originated the will in all its parts. He had no assistance or suggestions from any, so far as I know. There was no one present but him and myself. The only time I saw Mr. Williams that day, was in Keytesville in the morning. When we got through with the will it was about dark, and I went down and out, and mounted my horse and rode home.

Sometime in the summer of 1858, Petticrew came into my office at Keytesville, first talked of studying law, and then after some remarks on this subject, said he desired to know enough law to enable him to write a will. He then requested me to prepare written directions, which I promised to do, and did. He went off, and when he came back for the directions, I apprehended he might not be able to properly observe them, and I asked him if he was not going to Fayette to school, and on his replying that he was, I suggested to him to get Bob Prewitt or John F. Williams to write it for him.

Mrs. Garvin and her daughter (now Mrs. Krigbaum) resided about a mile and a half from Keytesville. They led a secluded life, only, as far as I know, going out to church. The daughter neither visited nor was she visited. She was the reputed mother of a bastard child, and her reputation suffered in that community, as I suppose it would in any community. Mrs. Garvin's son Gilliland did not live in Chariton after 1853. Her husband was never in this country to my knowledge. Never saw any of the relations of William D. Petticrew in the neighborhood of Keytesville, at any time, save those who lived there.

W. H. E., a witness for defendants, testified:

William Petticrew and Thomas and Robert Williams and myself grew up boys together. I often stayed all night with "Billy," and he often stayed with me. I went to school with him in Chariton and in Fayette. He was always treated by Mr. Williams' family like the balance of the boys, and he always appeared as one of the family. Mrs. Williams he addressed as "ma," Mr. Williams as "Uncle John," and the girls as "sister." Never knew or heard of any of his Virginia or Tennessee relations coming to see him. He and I were very intimate, and were together almost every Saturday, playing or hunting; have no recollection of his ever visiting Mrs. Garvin; know Mrs. Garvin's daughter when I see her, but don't know that I ever spoke to her. "Billy" spoke to me a great many times in regard to his family. One time in particular, I remember, in the summer of 1860, the same year that he died. I was then staying in Keytesville, and he came into town, and I went home with him. On the way, he told me that his mother's Bible had recently come into his possession from some of his aunt's family, and that he considered it very much of a disgrace that the names of Krigbaum's family (Krig-

baum married Mrs. Garvin's daughter) were recorded in it with his. Krigbaum's children's names, he said, were recorded on one side of the leaf, and the marriages, births and deaths of his father's family, were on the other side of the same leaf, and consequently he could not tear out the Krigbaum record. He wanted, he said, to tear out this record, but couldn't, he said, because it was on the same leaf with the other record. He was a good deal angry with that family, and swore a good many times, and said they should never have a d——n cent of what he had. His manner was pretty positive, and made a strong impression on me.

In 1858 or 1859 it was, I think, I playfully mentioned Miss Mattie Williams to him, and suggested that I thought he had an idea toward her, and that I was of the opinion it would suit him first rate. He told me he never wanted me to speak of that again—that he thought I had more sense—that what I had said mortified him—and that he felt if he should marry her it would be like marrying his own sister.

I always understood from him that he regarded himself as one of Mr. Williams' family, that he looked on the girls as his sisters, and the old people as his parents; so far as I know, he always looked upon Mr. Williams as a father. The conversation about the Bible occurred in the summer of 1860, in August, after he came from New Orleans. He spoke of the writing of Krigbaum as a great crime, and as a disgrace. From the time he was seven or eight years old he and I were constant companions. I was with him pretty much wherever he went. I never went with him to Mrs. Garvin's.

George Dewey, a witness for defendants, testified:

I knew Doctor Petticrew. Was one of his attending physicians, and was present when he made his will, which was in February, 1847, about one week before he died. Mr. Williams was there. He had been sent for, I think, and got there before the making of the will was concluded. The doctor made Mr. Williams the executor of his estate and guardian of his son. Mr. Williams asked the doctor what he should do with him, and how he wanted him educated; and the doctor told him he desired him "to treat him as he would his own child." At the time the doctor made Mr. Williams executor and guardian, Mrs. Garvin was living with the doctor. The boy remained with his aunt some two or three months after the doctor's death, and then went to Mr. Williams'. I often visited Mr. Williams' family after that, saw the boy there, and should say he was treated by the family as "Mr. Williams' own child." In mind and will he was about that of ordinary boys. He was neither a very sharp nor a very dull boy.

I was his attending physician in 1860, after he came up from the South. The weather was warm, I know, and he was sick and I attended on him. During the time I was attending him, sometime in August, I think, I went over and had a talk with him about his aunt Garvin. The way I came to talk with

him about her was this: I heard from the negro woman I had at my house, who heard through the other niggers, that "he wasn't going to give his aunt Garvin anything." And when I next visited him at Mr. Williams', I broached the matter of the disposition of his property, and suggested he should give his aunt the place she lived on. He was then sick, and I was attending him. He said "he wouldn't do it." He got into a passion and cursed about it. All that he said I can't remember, but I remember he swore he wouldn't give a d—n cent no how. Krigbaum, he said, had written his childrens' names in the family Bible. Don't remember that he said anything about his feelings toward Mrs. Garvin herself. No one was present during this conversation. I advised the trip South which he took the following fall. Mrs. Garvin wasn't of a very good disposition.

John A. Fugna, a witness for defendants, testified:

Knew Dr. Petticrew and Mrs. Petticrew. She died in April, 1845, soon after which the son, then a small boy, went and staid at Mr. Williams'. I was there frequently that summer, that is the summer of 1845, and saw him every time I went. He seemed to be treated as the other children were. During that time I heard him address Mrs. Williams as "ma," Mr. Williams as "uncle," and the girls, that is, Miss Mary and Miss Mattie, as "sister."

James R. Horsely, a witness for defendants, testified:

After his mother's death, young Petticrew went and staid at Mr. Williams' until his aunt Garvin came out from Virginia. During this period I visited there and saw the little fellow running around with the boys, and he appeared to feel at home and at ease, like the other children. He and Robert and Thomas Williams were about of an age, though they were a little larger. He called Mr. Williams "Uncle John," and how he addressed the other members of the family during that period I don't remember. After his father's death in 1847, he again went to Mr. Williams', and from that time on I visited the family, and I saw no difference between Mr. Williams and him, and Mr. Williams and his own boys. His intercourse with the family seemed as free and as familiar as that of any member. He spoke of Mr. Williams as "Uncle John."

John Nickerson, a witness for defendants, testified:

I lived on Mr. Williams' farm from 1846 to 1849. Mr. Williams' family treated young Petticrew about as they did the other children. He was frequently at my house. He had a great dislike to his aunt. He told me so. He said his aunt had whipped him severely, and he didn't like to be about her. He told me this the same evening or the morning after he came to Mr. Williams' to live. I know Mr. Williams once took him in his buggy, and left him at his aunt's in Keytesville, and on our return in the evening he took him home. I know he went to his aunt's at other times. I recollect hearing Mr. Williams tell him he ought to go and see his aunt, but don't know that he made a reply. The time that I heard Mr. Williams endeavor to induce him to go,

was in the fall of 1847, when he took him along with us in the buggy. He called the young ladies "sister," and Mrs. Williams "ma." Mr. Williams and Doctor Petticrew were very intimate.

W. H. Porter, a witness for defendants, testified:

I knew Petticrew as a little boy. He came to school to me in 1847, and then again in 1856. His capacity was about that of other boys—an average. He appeared to take care of himself and hold his own with the other scholars. In 1856 I approached him on the subject of doing something for his aunt and cousin, of helping them, and asked him if he would not. I suggested \$1,500. At this he seemed to fire up and be provoked. Finally I suggested \$500, and he said he didn't intend to do anything for them. His mind, he said, was fully made up on the subject, and he didn't intend to have anything to do with them. He spoke of his aunt treating him a little rough and harshly, and about Bettie and what had happened to her, and said he had no intercourse with them and they had sought none with him. I told him I expected his aunt had done nothing more than to try to make a good boy of him, and he seemed provoked at me a little that I should even suggest such a thing. I noticed on that occasion that he seemed to be a boy pretty much of his own will.

A. C. Dyas, a witness for defendants, testified:

I was adjunct professor in the Mathematical Department of Central College at Fayette, from the fall of 1858 till the close of the session in June, 1859. Petticrew was a student there part of that time. When he applied himself he got along very well. His capacity to acquire was what might be termed ordinary. I have no distinct recollection of his course after the Christmas holidays. He went to Chariton and returned, and shortly after had the measles, and was sick for some time. In the early part of the winter he boarded at Prewitt's, and continued there, I believe, until after he had the measles, when he went and boarded at Mr. Lewis'. He didn't give his whole time to study. I think, and thought at the time, that he had rather positive opinions of his own about everything. He was rather determined in anything he undertook. He had a cane, I remember, which I proposed to buy of him at cost, and he agreed I should have it, provided he could get another. I wanted him to let me have it then, but under no circumstances would he consent until he could ascertain whether he could procure one like it. The opinion I formed of him was, that he had capacity, but did not apply himself. After he had the measles, his health was decidedly feeble.

Charles V. Mead, a witness for defendants, testified:

Petticrew and myself were classmates at the Central College. We both entered there in September, 1857. After he came to Prewitt's to board, in February, 1858, we roomed, ate, slept and studied together. He stood about average in his classes. His constitution was delicate. In character he was independent, and in conduct quite so. He was rather inclined to take his own notions. His utterances were generally decided, and when he laid

down his ultimatum he seldom yielded. Among the students I knew none firmer than he in maintaining an opinion when he had once assumed it. When he came to Prewitt's to board, Thomas Williams came with him and boarded with us. The last time I saw him was in November, 1859, and there was no change in his mental capacity or vigor.

John F. Williams, a witness for the defendants, testified :

I am a lawyer ; Col. Frank Williams is my father, and Mrs. John P. Williams is my aunt. I lived at Fayette and practised law there, and in Chariton. I knew Wm. D. Petticrew from the time the went to Mr. John P. Williams' to live. I was often there, and saw no difference in the manner of treatment between him and the other children of the family. All were raised up alike. His capacity I regarded as average ; an average of the educated boys or young men of his age. He was rather obstinate than otherwise, had his own opinions, and was more stern and unyielding than most young men. In 1857 and 1858 I was with him a great deal. He boarded at my father's some ten months, and I spent my evenings there. He also boarded at my sister's, Mrs. Prewitt's, and afterward with Mrs. Lewis, a cousin of mine. My brother, Robert P. Williams, and he were of about the same age. Never knew him to be sick until after he had the measles. While boarding at Lewis' his health was delicate, and he told me Mr. and Mrs. Lewis were very kind and attentive to him. He always liked them. I knew Neal. Petticrew borrowed of me \$300 to pay, as he said Neal's board. This was in 1858. I remonstrated with him about his doing so, then loaned him the money which he afterward repaid. He always seemed to like me very much, and associated with me very well considering the differences in our ages, and I always regarded him and Tom Lewis as one of the family. He always treated my uncle John P. Williams and his wife as a boy would treat his father and mother, and their children, as brothers and sisters ; and he seemed to regard them as such. In the spring of 1859, after he had the measles, he went up to Chariton and returned. And about the close of the session in June, he came to my office and told me he wanted me to write his will. I looked up and laughed, and told him he was not old enough.

He replied he was over eighteen, and old enough to will his personal property. I told him certainly he was old enough for that, and then he proceeded to state the dispositions or bequests he desired to make. He made bequests to Neal, to John Lewis (one of the devisees here), to my brother, Robert P. Williams, (also a devisee here), and to myself. The bequests to us all were the same in amount, either \$2,500 or \$3,000 to each, which sum I cannot now remember. He also gave to each of the five children of John P. Williams a similar amount, and the overplus he gave to his "Uncle John," as he called Mr. John P. Williams. He said he didn't care particularly about giving his "Uncle John" anything, only he had managed the estate long and well,

and he thought it likely there was money loaned out he would never be able to collect back, the notes not being good, and he preferred giving him something, and would therefore give him the overplus to cover what he considered as losses. During the conversation I asked him how much personal estate he had. He told me. I asked him how he knew, and he said he had examined the statements made by his "Uncle John" and knew about what it was. He had examined "the paper," he said, and knew about what personal property and money there was. He valued the slaves himself. The portions he gave to Neal, Lewis, my brother and myself were in money, and those given to the children of John P. Williams were in slaves and money. This was about the last of June, 1859, and just before the school session closed. He requested me not to mention the fact that he had made a will at all, and to get parties to attest it that "would say nothing about it." I got A. J. Cooper and Charles Stewart, neither of whom read the will, nor was it read to them or in their hearing. The reason of this was Petticrew didn't want anybody to know its contents. I handed the will to Petticrew and never saw it again. While drawing up this will, I mentioned his aunt, and suggested he "ought to give her something." He said his father had made provision for her during her life-time, and that as to her daughter he did not wish she should inherit anything of his estate. He further said his aunt didn't need anything, and if he died before twenty-one, his real estate went to them anyhow. He also spoke of his relations in Virginia and Tennessee, said he didn't know them, and as far as he knew they cared nothing for him, and he had not a relation on earth he would let have any of his estate if he could help it.

I did not marry until December, 1859. My wife is a niece to John P. Williams, and visited his family, and Petticrew knew her and disliked her. He knew I was waiting on her, and when I went up to Jackson county in the summer of 1859 with him, he told me if I married her he wouldn't leave me anything in his will—"and he didn't either." I married her in St. Charles, and he came up from St. Louis and was present at the wedding, and I saw nothing more of him till August, 1860. At this last date his mind was as it always had been, but he was physically weaker. After the spell of measles, in February, 1859, a change took place in his health, and every time I saw him he was subject to a cough.

Robert T. Prewitt, a witness for defendants, testified :

Am a lawyer, and attended the Chariton court twice a year, and usually staid at Mr. Williams' one night, sometimes two nights in each term. Knew Petticrew there, and knew him intimately after he came to Fayette. He came with Tommy Williams, son of John P. Williams, and they boarded first with Col. Frank Williams, then they boarded with me about a year, after which they went and boarded with Mr. Lewis. Before leaving my house, he told me "Sue" (so he called Mrs. Lewis) and Mr.

Lewis had consented to take them, and he seemed to consider they had done him a favor. He spoke of it several times afterward to me, and said they had been very kind to him. The feeling he manifested toward them from the time they received him into their family was that of the utmost friendship and kindness. He felt himself under obligations to them for taking him there to board. He said Mr. Lewis had declined to take boarders, but had taken him as a favor. My wife is a niece of Mrs. John P. Williams and sister to Robert P. Williams, one of the devisees in this will, and cousin to Mrs. Lewis, the wife of John Lewis, who is another devisee in this will. Petticrew associated with Robert P. Williams at Col. Frank Williams', and seemed particularly fond of him. They were of about the same age, Petticrew being a little the younger, and they were very friendly and intimate.

After the close of the school in 1859, I rode up home with Petticrew to Chariton. It was in the summer. We had a conversation, but how it came up I do not remember. He was "anxious," he said, "to live till he was twenty-one." I told him I hoped he would live long beyond that, and asked why he was so anxious. He said he wanted to live to make his will, that his kin cared nothing for him and he didn't intend any of them should have a cent of his property. To this that he said about his kins-people, I said nothing in reply.

John W. Henry, a witness for defendants, testified:

I am a lawyer, and was frequently at Mr. John P. Williams' between the years 1848 and 1857; saw Petticrew there with the other children, and saw no difference, not a particle, in the treatment they received. He and John F. Williams were up on a visit at my house in Jackson county in the summer of 1859. While there I had a conversation with him in my office about business. He was then within a year of his majority, or thereabouts, and we talked about the pursuits best for young men to engage in. The conversation run generally on banking, law and mercantile business. Finally, he said his principal anxiety was not so much to determine what pursuit he would engage in, as to make a will. I asked him why he was so anxious about that, and he said if he died without a will his relations in Virginia, Tennessee and Missouri would get his property, and he didn't wish them to have it. I knew he had an aunt (Mrs. Garvin) in Chariton, and asked him why he didn't want her to have something, and he said his father had made provision for her, but what it was he did not say, nor did I ask. He said his father had provided for her, and that her daughter had disgraced his family, and he was determined none of her family should have any of his estate. I saw him afterward, in the spring of 1860, in New Orleans, and we had a conversation there in which he said about the same in substance that he did in my office in Jackson county. My wife is a sister to John F. Williams and niece to Mrs. John P. Williams.

W. H. Hardy, a witness for defendants, testified:

I knew Mr. Petticrew in St. Louis, in December 1859, when he was attending commercial college. Next saw him in New Orleans, about the 10th or 15th of January, 1860, and thence almost every day till he returned to Missouri. Thomas Williams was with him there, and in St. Louis also. When in New Orleans, Petticrew staid with me as often as two or three nights in a week, and we conversed a good deal together. In the latter part of the winter or early spring of 1860 he expressed a wish to live. His health was then delicate. I asked him why he should be so sollicitous, and he said he wanted to make his will. I said to him: "If you are going to die so soon, what difference is it whether you make a will or not?" and he said he wanted to give his property to his friends, and wanted to live till he was twenty-one, so he could do this. When in St. Louis I heard him speak of going to Orleans, and the person he was going with he spoke of or called aunt or cousin.

W. C. Driver, a witness for defendants, testified:

I live in New Orleans, and was engaged in the house of Goodrich & Co., in which Mr. Abbott was concerned. I saw and knew William D. Petticrew there in 1859 and in 1860, that is, two seasons. I was not intimate with him, but I knew him very well. I saw him twice in the latter part of 1860. I sat up with him twice, those being the times I saw him. I sat up with him the night before he died. He knew his end was approaching, for he told me so himself, and he told me he had made his will, and as far as it was possible for him to do, he had rewarded those who were kind to him, and Mr. Williams' ("Uncle John," he called him), and Mr. Abbott's family were not aware of the fact. No one else was in the room when he told me this except his servant, who was lying on the floor. He said Mr. Williams and Mr. Abbott were the best and only friends he had, the only ones who had shown him kindness. I don't know who came with him to New Orleans. On neither night that I was there was Mr. Williams there. He may have been, but I haven't the remotest idea that he was. Mr. Abbott was not there when he told me this, Don't know who took his remains to Missouri. He said Mr. Williams had raised him. He didn't say what Mr. Abbott had done; it wasn't necessary.

Fanny Montague, a witness whose deposition was taken by defendants, and read by plaintiffs, testified:

I have been very intimate with the family of Mr. Williams; spent much of my time with them—as much as six weeks at one time, while William Petticrew lived with them. From the manner in which they treated him I should not have known that he was not an own child of Mr. Williams'. He always addressed Mr. Williams' two oldest daughters as "sister" and Mrs. Williams as "mother." The affection he manifested for the family seemed fully equal to that manifested among themselves for each other. I have frequently seen him throw his arms around Mrs. Williams' neck and embrace her in the fondest manner, and she

treated him with the same affection she did her own children. Never heard any of the family in the presence of William say anything to the disparagement of his aunt, Mrs. Garvin. Heard Miss Lizzie ask him, when he had been to town, and his aunt lived there, if he had been to see her, and heard her urge him to go and manifest a proper respect for her. I never knew his aunt to visit him. Never saw her in my life. Mr. Williams always treated him like his own children. Never knew Mr. Williams to act tyrannically or in an overbearing manner toward him. He treated and governed William as he did his own children, more by the force of love than anything else. He had as good capacity for understanding and taking care of his own interest as most boys. This trait I remarked particularly. After the disease had taken hold of him, and before he was confined to his bed, the family manifested a great deal of anxiety and solicitude toward him.

[We omit, as unnecessary, the evidence on the part of the plaintiffs, and likewise the instructions given at their instance.]

The instructions given for defendants were as follows :

1. The court instructs the jury that Wm. D. Petticrew had the right by law, when twenty-one years of age, to devise and bequeath his property of all kinds to the persons mentioned in the will, or to just such persons as he chose ; and if the jury find from the evidence that the will in question was made by said Petticrew from his own free, independent volition and choice, and that the making thereof was not contrived or brought about by the legatees or either of them, then the jury shall find for the defendants.

2. Although the law will presume that a will made by Wm. D. Petticrew, during the existence of the guardianship of John P. Williams, or shortly after its termination, by which Williams was to be benefited, was procured to be made by the undue influence of John P. Williams, yet that presumption may be rebutted by testimony showing that the will was the result of other impulses and feelings ; and if Petticrew was induced to make the will by the kind treatment which he received from John P. Williams and his family, and that such kind treatment sprang from generous and disinterested motives on their part, and that in making said will he acted from his own free, independent volition and choice, they must find the issue for the defendants.

3. If the jury believe from the evidence that Wm. D. Petticrew received kind treatment from John P. Williams and his family—that such treatment sprang from generous and disinterested motives on their part, then such kind treatment affords no presumption of undue influence exerted over or upon said Petticrew, and does not impair the validity of the will in question.

4. The court instructs the jury that if they believe from the evidence that John P. Williams and his family, for years before the will was made, treated Wm. D. Petticrew with kindness and affection, and such kindness and affectionate treatment sprang from generous and disinterested motives, and did not result from

selfish or sinister purposes, and the will in question resulted from such kindness and affection, and was made by said Petticrew of his own free, independent volition and choice, then the jury should find in favor of such will.

5. The statements of William D. Petticrew, as to what John P. Williams or any of the legatees in the will said in relation to Mrs. Garvin or any of her family, are not competent to prove that John P. Williams or any of the legatees made any such statements.

Glover & Shepley, Harris; and Crews, Letcher & Laurie for appellants.

Sharp & Broadhead, Knox, Shackelford, and Wingate, for respondents.

The opinion of the court was delivered by

WAGNER, C. J.—The instructions given by the court on the trial of this cause were unexceptionable, provided there was evidence sufficient to justify them. When this cause was here before we held that a transaction like the will in question, between a guardian and a ward, could not stand if the period between the making of the will and the coming of age of the ward was short, unless the circumstances showed in the most satisfactory manner, and beyond a reasonable doubt, the most entire good faith on the part of the guardian. *Garvin v. Williams*, 44 Mo. 465. When a ward has but recently arrived at age, any acts of his conferring an advantage or bounty upon his late guardian excite the strongest suspicions and are viewed by the courts with an almost invincible jealousy. They are considered as constructively fraudulent on account of the confidential relations existing between the parties. They are withdrawn from the operation of the ordinary rules of evidence, and the burden is devolved on the beneficiary of showing that the gift or arrangement was fair and conscientious and beyond the reach of suspicion. A rule of public policy and pure morals lies at the foundation of this principle and demands its stringent enforcement. Any one occupying a fiduciary relation so recently that the influence is presumed to still exist cannot avail himself of a bounty from his late ward, or other person holding the relation, unless there is clear and distinct evidence that the influence has determined, and that the donor acted perfectly free, independent and unbiassed. And the beneficiary must in all instances furnish this evidence. That it is not easily attainable, I am aware, and therefore learned judges have said that it was almost impossible to make this proof. I have in vain searched this record to find any evidence introduced by the defendants, the beneficiaries in the will, to overthrow and repel the presumptions which the law raised that the will was procured and made while the testator was under the immediate influence of those who were to be benefited by it. Without that evidence the will cannot stand. It is not a question of the weight or evidence with which we would not in-

terfere, but it is a case of an entire want of evidence. The instructions, therefore, given for the defendants, while good enough as abstract propositions of law, were erroneous because there was no evidence to support them.

This must lead to a reversal of the case. But there is a question presented by the record in respect to the action of the court in rejecting certain evidence offered by the defendants.

On the trial some of the beneficiaries under the will, and who were parties to the suit, were introduced as witnesses, but they were objected to, and the court ruled that they were incompetent. Exceptions were duly taken.

For the appellant, it is insisted that the court committed no error in holding that the witnesses were incompetent to testify, and the argument is based on that section of the statute which allows parties to give evidence, but provides "that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead or shown to be insane, the other party shall not be admitted to testify in his own favor." This question has never been raised before in this court, under the statute. In the case of *Tingley et al. v. Cowgill et al.* 48 Mo. 29, all the parties to the record, both the contestants to the will and those who took under it were admitted to testify, and the point was not even made or alluded to. The cases cited to sustain the ruling of the court are adjudications where either the estate of the deceased person was a party, or where the contest arose out of some contract or agreement with the deceased in his life-time, and in which his assignee or representative was a party.

But proceedings in reference to the establishment or invalidity of a will stand on a different foundation from ordinary actions at law or causes of actions. They are in the nature of a proceeding *in rem*, and simply amount to a revival of the same matter in the Circuit Court which has been previously had in the county court. The same legal rules that govern the investigation in the county court apply in the Circuit Court. The heirs at law and devisees are made nominal parties, but in truth the proceeding is *ex parte*, and all are competent witnesses. See *Dickey v. Malichi*, 6 Mo. 177.

The section in our statute now under consideration is a precise and literal copy of the statute of Massachusetts, and in that State the question has been directly passed on, and received a definite construction. The case arose upon contesting the will of Miss Burnstead. Shaler and Hayden were devisees under the will, and also executors, and it was alleged that they procured the will to be made by undue influence and fraud. Upon the trial they were permitted to give testimony in their own behalf. This was assigned for error. The Supreme Court, in reviewing the question, say: It was further objected that Hayden and Shaler were not competent witnesses under the statute, but this is not a case where one of the original parties to the contract, or cause of action in issue, and on trial, is dead.

They are not parties in a representative capacity—there was no cause of action in existence till the death of the testatrix. The controversy is between living parties. The testatrix is in no sense a party to the original cause of action. Her act was only the subject matter of investigation. The rule contended for would exclude parties on both sides in all cases where litigation should arise growing out of the act of another during life. We cannot construe the proviso of the statute so as to exclude as witnesses all those who may be parties on one side or the other in all probate appeals like this; and we find no error in the ruling. *Shailer v. Bumstead and others*, 99 Mass. 112.

With this reasoning we are satisfied. The real question in the case is whether there is a will or not, and upon that question all the parties have a right to testify.

We think the court also erred in excluding parts of the depositions of Steele and Eliza Garvin, offered by the plaintiffs. They were both upon questions concerning which the defendants gave testimony, and were properly explanatory of and connected with that testimony. The statement of Steele was material, and when he says the invitation of Williams was in a cool, formal and distant manner, I think the description was sufficiently particular.

That portion of Eliza Garvin's deposition which mentioned the kindness of Mrs. Garvin for Petticrew, the testator, was certainly competent. The whole theory of the defense, running throughout the trial, was, that she cared nothing for him. The plaintiffs were entitled to the evidence to show its falsity.

For the ruling of the court in rejecting testimony, the judgment must be reversed and the cause remanded.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW HAMPSHIRE.¹

SUPREME COURT OF NEW YORK.²

AGENT.

Traveling Salesman.—A traveling merchant, who is authorized to sell all the goods of his principals that he can sell within his business circuit, on a commission of ten per cent., is to be regarded as the general agent of his principals, and clothed apparently with the power of fixing the price, and the time and mode of delivery of the goods and the payment of the price, unless a different usage in such trade is shown: *Day Light Burner Co., v. Odlin*, 50 or 51 N. H.

And third persons will not be affected by a limitation on this authority which is not brought to their notice, or in relation to which they are not put upon inquiry: *Id.*

Therefore, when such agent has sold goods on credit, which are

1. From the judges; to appear in 50 and 51 N. H. reports.

2. From Hon. O. L. Barbour; to appear in Vol. 62 of his reports.